

(2)  
No. 90-620

Supreme Court, U.S.  
FILED

JAN 23 1991

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1990

**MASSILLON BOARD OF EDUCATION,**  
*Petitioner,*

vs.

**THERESE A. FARBER,**  
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**RESPONDENT'S BRIEF IN OPPOSITION**

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i.

**QUESTION PRESENTED**

I. Does the Supreme Court have jurisdiction to decide the Petition for a Writ of Certiorari presently pending before the Court as filed by the Petitioner, Massillon Board of Education?

ii.

## **PARTIES**

The parties have been properly identified by the  
Petitioner.

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**RESPONDENT'S BRIEF IN OPPOSITION**

Respondent respectfully prays this Court to deny for lack of jurisdiction the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, filed July 12, 1990, petition for rehearing *en banc* denied September 28, 1990, vacated December 11, 1990.

## OPINIONS BELOW

The opinion of the Court of Appeals reported at 908 F.2d 65, dated July 12, 1990, and included in Petitioner's Appendix (pp. A-1 to A-19), was vacated and the mandate issued October 12, 1990 was recalled by an order filed December 11, 1990. A copy of the latter order is attached as Appendix A1. The Court of Appeals issued a new opinion, also dated December 11, 1990. Respondent has not appended a copy of the second opinion for reason of economy and because it is virtually identical to the Court of Appeals' original opinion except with respect to two brief portions which are set forth below.

The Court of Appeals' first opinion, dated July 12, 1990, at page 12, last paragraph, contains the following language:

... Ohio Revised Code §2305.10 accordingly allows two years from accrual for filing of a claim under 42 U.S.C. §1983, such as Appellant's and she was timely. The only question then left for our consideration is whether, as the Board argues, Appellant is now collaterally estopped from bringing these claims by the district court's interim bench trial and determination of her Title VII claims on the same facts.

This language erroneously indicated that *both* of Respondent's claims, that is, her 1978 claims for denial of a principalship and her 1980 claims for denial of the Director of Instruction position, were timely brought on April 15, 1982 for purposes of the §1983 remand trial, when in fact only the 1980 claim had occurred within the two year period immediately preceding the filing of the Complaint. Petitioner raised this error in its Petition for Rehearing *En Banc* filed July 26, 1990.

Respondent admitted in Appellant's Response to Appellees' Motion for Rehearing *En Banc*, filed September 11, 1990, that her 1978 claims could *not* be timely brought and stipulated that she would not include it in the §1983 remand trial. See Petitioner's Appendix, pp. A-17, A-48.

Although the Court of Appeals denied the Petition for Rehearing *En Banc* (order dated September 28, 1990, App., A-20, A-21), it ultimately corrected its initial decision by vacating it and issuing a new opinion. The Court's December 11, 1990 opinion substituted the following language at pages 12-13 for that quoted above:

... Ohio Revised Code §2305.10 accordingly allows two years from accrual for filing of a claim under 42 U.S.C. §1983, thus *Appellant's 1980 claims for the position of Director of Instruction was timely filed. Her 1978 principalship claims, however, having been filed in April, 1982, is barred by the applicable statute of limitations.* The only question then left for consideration is whether, as the Board also argues, Appellant is now collaterally estopped from bringing *the 1980 §1983 claim* by the district court's interim bench trial and determination of her Title VII claims on the same facts (emphasis added).

The highlighted language was added by the Court of Appeals to reflect the fact that all parties were in agreement that Respondent's 1978 claim was not timely brought in April, 1982 and, hence, should not be included in the §1983 remand trial. The balance of the court's second opinion was changed, where appropriate, to refer only to the 1980 claim as being the subject of the §1983 remand trial.



## **JURISDICTION AND ARGUMENT**

Respondent submits that this court lacks jurisdiction to grant the Petition for a Writ of Certiorari by reason of the fact that the Court of Appeals vacated the judgment which the Petitioner is seeking to have reviewed by the Supreme Court. Hence, the vacated judgment cannot be reviewed. Petitioner must file a new petition which addresses the Court of Appeals' December 11, 1990 judgment and opinion.

**CONCLUSION**

**Respondent submits that the court should deny the  
Petition for a Writ of Certiorari for lack of jurisdiction.**

**Respectfully submitted,**

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*Attorney for Respondent*

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A1

**APPENDIX**

**Order of the Court of Appeals  
for the Sixth Circuit**

(Filed December 11, 1990)

Nos. 87-4035/89-3456

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**THERESA A. FARBER,**  
*Plaintiffs-Appellants,*

v.

**MASSILLON BOARD OF EDUCATION,**  
*Defendants-Appellees.*

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**ORDER**

**BEFORE: KEITH and KRUPANSKY, Circuit Judges;**  
**and TAYLOR, District Judge\***

**JUDGMENT**

**ON APPEAL** from the United States District Court  
for the Northern District of Ohio,

**THIS CAUSE** came on to be heard on the record  
from the said district court and was argued by counsel.

The judgment of this court in this case entered July  
12, 1990 is hereby vacated and the mandate issued  
October 10, 1990 is hereby recalled.

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\* The Honorable Anna Diggs-Taylor, United States District Judge  
for the Eastern District of Michigan, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ORDERED and ADJUDGED by this court that the judgment of the said district court in this case be and the same is hereby reversed and the case is remanded for further proceedings in accordance with the revised opinion filed by this court on 12/11, 1990. The costs are to be awarded to the appellant in the amounts ordered in the vacated judgment as follows:

Filing fee	\$210.00
Printing	<u>\$688.30</u>
TOTAL	\$898.30

The clerk is directed to issue a new mandate and distribute the revised opinion to the parties as expeditiously as possible.

ENTERED BY ORDER  
OF THE COURT

/s/ LEONARD GREEN  
Clerk